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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

SEP 0 6

In the Matter of	)	
	)	
Adoption of Rules Relating to the	)	RM ____________
Operation of Radio and Television	)	
Station Under Time Brokerage Agreement	)	

To: The Commission

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PETITION FOR RULEMAKING

David Tillotson, an attorney who represents numerous broadcast clients in their relations with the FCC, hereby petitions for the opening of a rule making proceeding to develop rules, in essence a list of "does and don'ts," for licensees and time brokers to follow in order to ensure that operating a broadcast station under a time brokerage or local marketing agreement does not result in an unauthorized transfer of control of the brokered station in violation of Section 310(d) of the Communications Act of 1934, as amended (the "Act"). Such a rule making proceeding is urgently needed because there are currently no objective standards for determining what sort of activities under a time brokerage agreement will be deemed by the Chief of the Mass Media Bureau ("Chief MMB") to constitute a violation of Section 310(d). In the absence of such objective standards, rulings of the Chief MMB which hold that a particular time brokerage arrangement does, or does not, amount to an unauthorized transfer of control are inherently subjective, arbitrary and capricious, and, consequently, any sanctions imposed based upon such rulings are unenforceable. *See Freeman United Coal Min. Co. v. Federal Mine Safety and Health Review Commission,* 10 8 F. 3d 358 (D.C. Cir 1997); *Walker Stone Co., Inc. v. Secretary of Labor*, 156 F. 3d 1076 (10th Cir. 1998); *Bama Tomato Co. v. U.S. Dept. of Agriculture*, 112 F. 3d 1542 (11th Cir. 1997).

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The impetus for this Petition is a recent case, *United States v. King Broadcasting, Inc*. (the "King Broadcasting case"), which was filed by the United States in a federal district court in Alaska to collect a forfeiture assessed against King Broadcasting, Inc. for allegedly transferring control over Stations KSLD(AM) and KKIS-FM, Soldotna, Alaska (the "Stations"), under a time brokerage agreement. The letter ruling of the Chief MMB in the King Broadcasting Case, DA 98-1509 released July 29, 1998 ("King Broadcasting Letter Ruling") cited numerous "factors" which had led the Chief MMB to conclude that an unauthorized transfer of control of the Stations had occurred. These factors included the following:

(i) The licensee had no ownership or control over certain items of broadcast equipment and had no right to use such equipment in the absence of the time brokerage agreement.

(ii) The licensee had no financial responsibility for the construction, maintenance or operation of the auxiliary studios from which the broker originated programming to be broadcast over the Stations under the time brokerage agreement.

(iii) Rather than follow the procedures in the PSA whereby broker was to reimburse the licensee for the expenses of owning and operating the Stations, the broker paid some of the Stations' expenses directly on the licensee's behalf.

(iv) The licensee was not responsible for either the telephone bill or the power bill at the auxiliary studio from which the broker produced programming for broadcast over the Station.

(v) The licensee's management-level employee and her assistant were never present at the auxiliary studio location from which the broker originated virtually all of the programming aired on the Stations, and the licensee had no physical or legal control over that auxiliary studio.

(vi) The auxiliary studio from which the broker originated programming for broadcast on the Stations was the primary broadcast origination point for the Stations and no significant amount of programming was ever broadcast from the Stations' main studio

(vii) The licensee never utilized time reserved by the licensee for the broadcast of news, public affairs, and other programming

(viii) Other than their full-time presence at the Stations' main studio, the licensee's employees did not have any significant role in the Stations' day-to-day programming or business operations.

During the discovery phase of the King Broadcasting case, the United States admitted that not a signal one of the above-cited "factors" which collectively led the Chief MMB to conclude that King Broadcasting was liable for a $10,000 forfeiture for having allowed an unauthorized transfer of control of the Stations to the broker to have occurred was a *per se* violation of any Commission rule or policy.[1] However, while admitting that none of the factors, in and of themselves, was a *per se* violation, the United States qualified each admission by repeating the following mantra that the FCC routinely uses to explain how it deals with allegations that an unauthorized transfer of control of a broadcast station has occurred:

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1. These admissions were made by the United States in close consultation with the Office of the General Counsel of the Commission and officials of the Commission's Mass Media Bureau and, while the admissions were made in the name of the United States, they clearly were made on behalf of, and were legally binding upon, the Commission. Moreover, the formal admissions by the United States that none of the "factors" cited in support of the finding of a transfer of control were "*per se*" violations were confirmed by deposition testimony of a Deputy Chief of the Audio Services Division of the Mass Media Bureau, Peter Doyle.

> There is no exact formula by which "control" can be determined. The ascertainment of control in most instances must of necessity transcend formulas, since it involves an issue of fact which must be resolved in the special circumstances presented.

Southwest Texas Public Broadcasting Council, 85 FCC 2d at 715. The Deputy Chief of the Audio Services Division of the FCC's Mass Media Bureau, Peter Doyle, repeated this mantra at a deposition in the King Broadcasting case to explain why it would not possible to make a list of "do's and don'ts" that would help a licensee or broker entering into a time brokerage agreement" avoid actions that would be considered by the FCC to have resulted in a transfer of control. When Mr. Doyle was asked at his deposition to explain how the FCC uses the various "factors" which, though not *per se* violations, are considered by the agency to determine whether a transfer of control has occurred in reach a conclusion as to whether a particular relationship between a broker and licensee has crossed the line from no violation to violation of Section 310(d), Mr. Doyle responded again with the mantra, stating simply that "[t]he Commission evaluates the totality of the circumstances, and, if it concludes that a *de jure* or *de facto* transfer of control had occurred, they so find."

Although the Commission also has repeatedly stated, mantra-like, that the licensee of a brokered station must retain control over the station's "programming, staff and finances," this general statement provides no useful guidance to licensees or brokers because:

(i) Under a typical time brokerage agreement, all programming is acquired or produced by the broker, with the broker's own staff, and the only "control" that the licensee retains is the contractual right, but not the obligation, to pre-empt or reject programming and to broadcast public service programming;

(ii) Under a typical time brokerage agreement, the only staff that the licensee has to "control" are one or two employees (depending upon how seriously the licensee takes the Commission's pronouncements regarding a licensee's minimum staffing obligations) who merely baby-sit the station's "main studio", who play no role in the actual business operations of the station and whose only purpose is to satisfy the Commission's minimum staffing requirement.

(iii) Under a typical time brokerage agreement, the only station "finances" for which the licensee remains responsible are the payment of rent, insurance on the station's physical assets, utilities, and the salaries of the licensee employees who are retained by the licensee to meet the Commission's minimum staffing requirement. These financial obligations are usually a mere pittance when compared to the financial obligations of the broker in connection with the business activities of the radio station.

The business and operations of a radio station consist primarily of producing and acquiring programming, promoting the station and marketing advertising in the programming. As the FCC admitted in the King Broadcasting case, at a brokered station, all of these activities are typically conducted exclusively by the broker. Thus, the Commission's mantra that the licensee of a brokered station must retain control over the station's programming, finances and staffing does not reflect the real world in which brokerage exists, and provides absolutely no guidance to licensees or brokers as to what they are expected to do in order not to run afoul of Section 310(d) of the Act.

The need for the formulation of specific rules to provide guidance to licensees and brokers as to what sort of relationships and conduct under a time brokerage arrangement are acceptable, and what ones will be deemed to cross over the line to a transfer of control was highlighted in the King Broadcasting case by the fact that the Chief MMB relied heavily on the following two "factors" to support his conclusion in the Letter Ruling that a transfer of control had occurred: (i) that the broker had owned essential items of broadcast equipment and the broker had paid directly certain expenses of operating the Stations. These same two "factors" were present in, and central to, *Southwest Texas Public Broadcasting Council,* 85 FCC 2d 713 (1981) ("*Southwest Texas*"), a case wherein the Commission found that a transfer of control had **not** occurred. Significantly, *Southwest Texas* was cited by the Commission in *Revision of Radio Rules and Policies,* 7 FCC Rcd 6387, ¶¶63 - 64 (1992), as a case that interested parties should look to for elucidation of the standards that the Commission would use to determine whether an unauthorized transfer of control had occurred under a time brokerage arrangement. The fact that the very factors which were found **not** to constitute an unauthorized transfer of control in *Southwest Texas* were cited by the Chief MMB as major factors in his determination that a transfer of control had occurred in the King Broadcasting case underscores the need for the Commission to articulate, through the adoption of rules, the standards that it will apply in assessing whether a time brokerage arrangement has resulted in a violation of Section 310(d) of the Act.

The lack of any objective standards by which to judge whether a licensee has retained the requisite degree of control over its station under a time brokerage arrangement, or whether the arrangement constitutes an unauthorized transfer of control in violation of Section 310(d) presents two significant problems. First, it makes it impossible for even the most conscientious licensees and brokers to fashion a time brokerage arrangement that that they can be confident will not be found by the Commission to have resulted in a violation of Section 310(d) and, thus, exposes those licensees and brokers who conscientiously attempt to avoid a violation of Section 310(d) to the risk that they will be put to the not insubstantial expense of defending their relationship in a proceeding before the Commission and ultimately in court.[2] Second, it renders any decision that the Commission may issue in a case involving allegations of an unauthorized transfer of control under a time brokerage agreement inherently arbitrary and capricious, and ultimately, unenforceable.

The due process clause of the Fifth Amendment requires that in order for a penalty to be imposed for violation of a regulation, the regulation must be sufficiently clear and specific to give a reasonably prudent person, familiar with the conditions that the regulations are meant to address and the objectives that the regulations are meant to achieve, fair warning of what the regulation requires. *See Freeman United Coal Min. Co. v. Federal Mine Safety and Health Review Commission,* 10 8 F. 3d 358 (D.C. Cir 1997); *Walker Stone Co., Inc. v. Secretary of Labor*, 156 F. 3d 1076 (10th Cir. 1998); *Bama Tomato Co. v. U.S. Dept. of Agriculture*, 112 F. 3d 1542 (11th Cir. 1997). The Commission's standards for determining whether a time brokerage arrangement violates Section 310(d) clearly do not satisfy this constitutional due process requirement. As noted above, the FCC has repeatedly stated that there is no precise formula for determining whether Section 310(d) of the Act has been violated. In the King Broadcasting case, the

[2] As discussed below, the due process requirements of the Fifth Amendment render it virtually impossible for the Commission to prevail in any court proceeding brought to recover a forfeiture imposed for an alleged violation of Section 310(d) resulting from a time brokerage arrangement. Nevertheless, local U.S. attorneys who are not familiar with Commission policies and case law relating to time brokerage cannot be expected immediately to recognize that the Fifth Amendment bars recovery of the forfeiture in a civil action. Therefore, licensees and brokers against whom forfeitures for violation of Section 310(d) are assessed will need to educate U.S. Attorneys who bring civil actions to collect the forfeitures as to the due process infirmities of the government's case through discovery, at substantial expense to both themselves and to the government. To ease this burden on licensees and brokers wishing to contest an action to collect a forfeiture for violation of Section 310(d), and on U.S. Attorneys offices who bring such cases, Petitioner will make available the motion for summary judgment that he had prepared in the King Broadcasting case to anyone who requests it.

FCC itself admitted that (i) it is impossible to come up with even a basic list of "do's and don'ts" that licensees and brokers can follow to avoid violating Section 310(d); (ii) none of the specific "factors" that the Chief MMB had considered in reaching his conclusion King Broadcasting had violated Section 310(d) was in and of itself a violation of the section or of any FCC rule or policy; and (iii) the FCC does not even have a formula for weighing the various "factors" that it considers in determining whether a violation of Section 310(d) has occurred to aide it in reaching a decision as to whether a violation has occurred in a specific case. By its own admissions, the standards that the FCC applies in determining whether a violation of Section 310(d) has occurred are entirely subjective and incapable of being communicated to the public in a form that would give "a reasonably prudent person, familiar with the conditions that the regulations are meant to address and the objectives that the regulations are meant to achieve, fair warning of what the regulation requires." *Freeman United Coal Min. Co. v. Federal Mine Safety and Health Review Commission, supra.* The FCC's current application of its policies regarding time brokerage and Section 310(d) are the ultimate *Catch 22,* as there is no way for even the most diligent licensee, one who has read the FCC's decisions which address the question of what sort of activities constitute an unauthorized transfer of control, to structure its activities and business relationships under a time brokerage agreement so as to ensure that it will not be found by the Commission to have transferred control to the broker. Accordingly, unless and until the Commission adopts objective criteria for judging whether a time brokerage arrangement does or does not violate Section 310(d), any sanctions that the Commission might seek to impose against licensees or brokers that it deems to have engaged in an unauthorized transfer of control of a broadcast station will be unenforceable.

In a rule making proceeding to set objective standards for determining whether a transfer of control has occurred under a time brokerage agreement, the Commission should seek to establish a list of specific "does and don'ts" for licensees and brokers to follow in order not to run afoul of Section 310(d). Among the specific questions that should be considered in such a rule making proceeding are:

- Whether in order for a licensee to fulfill its obligation to remain in control of the programming aired on a brokered station the licensee must do more than merely retaining the contractual right to reject or pre-empt the broker's programming.

- Whether in order for a licensee of a brokered station to fulfill its obligation to operate the station in the public interest, the licensee must actually broadcast programming that is either produced or selected by the licensee which addresses local community needs and issues?

- Whether, and to what extent, a licensee of a brokered station must exercise control over the personnel who are responsible for the production and acquisition or programming to be aired on the station, the sale of advertising on the station and the other actual business activities of the station?

- Whether, and to what extent, the licensee of a brokered station must exercise control over any financial aspects of the broker's business activities?

- Whether it is permissible for a brokerage agreement to require that the broker reimburse the licensee for all of the licensee's expenses of owning and operating the station and, if it is, whether there is nevertheless impermissible for the broker to pay some or all of the reimbursable expenses directly to third parties on the licensee's behalf?

- Whether a licensee of a brokered station must employ its own Chief Engineer on a salaried or contract basis, or whether the duties of Chief Engineer may be performed by an engineer employed by the broker?

- Whether it is permissible for the employees of the licensee of a brokered station also to be employed by the broker?

WHEREFORE, for the foregoing reasons, defendant respectfully submits that a rule making proceeding should be instituted to establish specific rules for the operation of broadcast stations under time brokerage agreements in compliance with Section 310(d) of the Act.

Respectfully submitted,

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